(3)

No. 86-1791

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

TRAVIS WARD,

Petitioner,

v.

SENTRY TITLE CO., INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this case presents any questions of important public policy sufficient to justify that this Court review the entire factual record?

2. Whether the Fifth Circuit and this Court have previously considered and adjudicated the resulting trust issue foreclosing it from further consideration under the Law-of-the-Case Doctrine?

3. Whether the Fifth Circuit, in applying the Law-of-the-Case Doctrine, was correct in refusing to disregard the precedent set by the panel in *Sentry I?*

4. Whether the Fifth Circuit Court of Appeals correctly interpreted the substantive Texas law regarding resulting trust?

5. Whether in reviewing the district court decision, the Fifth Circuit Court of Appeals allowed Petitioner due process and equal protection under the Due Process Clause of the Fifth and Fourteenth Amendments and the Rules of Decision Act?

6. Whether Petitioner is now pursuing frivolous remedies in an attempt to thwart the results of his unsuccessful appeals?

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Respondents pray that Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above-entitled case, entered September 26, 1983, affirmed on March 12, 1984, and again affirmed on January 7, 1987, be denied, and that Respondents be awarded damages.

COUNTERSTATEMENT OF THE CASE

This case involves title to a 9-acre lakefront tract of land located near Athens, Texas, referred to in this litigation as the "Dyckman Tract." Two other tracts, an adjoining 490-acre tract over which passed an easement to the Dyckman Tract and a 16-acre tract located in Athens, Texas (the "LaRue Tract") also figured prominently in this case. Title to all three tracts was taken in the name of Respondent, Sentry Title Co., Inc., or in the name of another company (Home Engineering, Inc.) controlled by Respondent's sole shareholder, Alan Whatley ("Whatley"). Petitioner sought, in this action, to impose either a constructive or a resulting trust on the Dyckman Tract.

Petitioner was a sophisticated and experienced businessman who had known of Whatley for several years but never met him until sometime in 1969 when they first met casually. Thereafter, beginning sometime in the spring of 1970, they met several times to discuss possible land deals in the Athens, Texas area. Their discussions finally focused on the desirability of acquiring the 490-acre tract which Whatley had been negotiating to acquire for some months.[1] Whatley and his then attorney, Bill Hart, had also previously been negotiating with Dyckman to acquire the 9-acre tract.[2] Thereafter, between July 6, 1970 and July 28, 1970, Petitioner Whatley and Hart had two meetings concerning the purchase of the Dyckman property. On or about July 24, 1970, the Dyckman Tract was sold to Home Engineering, Inc., a company controlled by Whatley, for $30,500. The purchase price included a promissory note for $25,500 *from Home* to Dyckman.

All subsequent payments made on the Dyckman note were made by *Home* and the property was rendered for ad valorem

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[1] *Harris v. Sentry Title Co., Inc.*, 715 F2d 941, 944 (5th Cir. 1983) (hereinafter referred to as *Sentry I.*)

[2] Findings of Fact and Conclusions of Law, Findings of Fact No. 19.

property tax purposes by *Home*. Whatley or his companies were also the makers of the promissory notes given for the other two properties.

After Home encountered financial difficulties, the Dyckman Tract was foreclosed upon and Petitioner asserted a constructive trust or resulting trust on the proceeds from that foreclosure, claiming that Respondent was purchasing the Dyckman Tract (and the other properties) for Petitioner's benefit. Ward, contending that Whatley and his companies had acquired the properties for Ward's benefit, confronted Whatley at Whatley's office. After an altercation, Ward promised that he would make Whatley "sorry" for having become involved in these deals.[3]

Throughout the proceedings in the trial court and court of appeals, and in the course of the previous petitions to this Court,[4] Petitioner contended that the property should be held in either a constructive or a resulting trust in favor of Petitioner. Otherwise, the Texas Statute of Frauds and Texas Trust Act would have foreclosed Ward's claim. That argument having been rejected seven times by the Fifth Circuit (three times in published opinions and four times in refusals to grant motions for rehearing and suggested rehearings *en banc*), and certiorari having been previously denied twice, Ward now seeks to again attempt to pursuade this Court that the Fifth Circuit misapplied Texas law to the somewhat complicated facts in this case, that the issue of resulting trust was never previously adjudicated and that Texas law, contrary to the Fifth Circuit's opinion, allows imposition (based on these facts) of a resulting trust in Ward's favor. Ward neglects to mention that he previously unsuccessfully raised the *resulting trust issue* at the appellate level three times: (1) in his first Motion for Rehearing following *Sentry I;* (2) in his second Motion for Rehearing and second Suggestion

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[3] Trial transcript p. 612.

[4] No. 83-1581 and No. 84-547.

for Rehearing *En Banc* following *Sentry II*; and (3) in his first Petition for a Writ of Certiorari in this Court.[4] Ward also neglects to mention that while the *Sentry I* panel noted in footnote number 4 that neither party raised *in their briefs* the issue of resulting trust, the court *in the body of its opinion* clearly analyzed, addressed, and *rejected* resulting trust as an alternative theory of upholding the district court judgment in Ward's favor.

REASONS FOR DENYING THE WRIT

I. This Case Does Not Present Any Questions Of Important Public Policy And Would Require This Court To Sift Through The Entire Factual Record To Review The Fifth Circuit's Decision.

Petitioner, for the third time in this Court, alleges that the Fifth Circuit violated the *Erie* Doctrine. It has never been disputed that Texas substantive law governs this action. The Court of Appeals recognized this requirement[5] and correctly interpreted the controlling Texas law and applied it to the facts of this case. In truth, Petitioner does not claim an *Erie* violation but, rather, merely quarrels with the results of the Fifth Circuit's application of Texas law to the facts of this case. Petitioner's arguments for application of the *constructive* trust theory have now been presented four times to the Fifth Circuit and two times to this Court, all of which found no acceptance. Petitioner's arguments for application of the *resulting* trust theory have now also been presented four times to the Fifth Circuit and once to this Court; and having not previously found acceptance, Petitioner *now again* seeks relief from this Court. The Petition presents no unusual questions or questions of particularly

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[4] No. 83-1581 and No. 84-547.

[5] *Sentry Title Co., supra.* at 945. [715 F2d 941 (5th Cir. 1983)]

important public policy. Rather, the case is simply an ordinary exercise in the application of Texas substantive law to the facts at hand. Petitioner is merely dissatisfied with the outcome of that application.

Petitioner asserts that the manner in which the Fifth Circuit addressed Petitioner's state law claim of resulting trust resulted in " . . . a patently obvious inequitable administration of federal law form over state law substance."[6] The only inequitable administration of law has been Petitioner's own abuse of the appellate process by infringing upon the Court's time and the Respondent's due process right that all litigation should ultimately be brought to an end.

The arguments in Petitioner's *third* petition for a writ of certiorari, once again, fail to fall within the purview of those questions which will normally give rise to granting review (Supreme Ct. Rule 17.1(a)), inasmuch as there is no conflict between the decisions of the Fifth Circuit and any decision of the Texas Supreme Court (or, for that matter, of this Court). As can be seen from the truncated statements of the case contained in the Petition and this Response, as well as far more detailed statements reflected in the three opinions of the Court of Appeals, the determination of the merits of this case is highly dependent upon a full appreciation of the *entire* factual record developed in the trial. The decisions of the Court of Appeals reflect an intimate intertwining of the facts of the case (those specifically found by the trial court and those which are undisputedly in the trial record) with the case law of Texas.

Put another way, the Petitioner merely requests that this Court grant a writ of certiorari to review the full evidentiary record and any inference that might be drawn and substitute its judgment for that reflected in the these prior appeals court opinions. This does not form a sufficient basis for issuance of a

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[6] Petition For A Writ of Certiorari, p. 8.

writ of certiorari.[7] The petition presents, in major part, the question of whether there is sufficient evidence to support imposition of a resulting trust on real property. This is just the type of factual inquiry into which this Court has repeatedly declined to engage.[8]

The Petitioner's Appendix K, a spreadsheet comparing the results of decisions reached in this case throughout the appellate process, attempts to show that the resulting trust issue was not adjudicated until the case was remanded to the District Court after *Sentry II*. While such a graphic display is interesting, it is inaccurate and completely misconstrues the opinions of the Fifth Circuit and the briefs presented in that Court.

II. The Fifth Circuit And This Court Have Previously Considered And Adjudicated The Resulting Trust Issue Foreclosing It From Further Consideration Under The Law-Of-The-Case Doctrine.

Petitioner alleges that the resulting trust issue was never adjudicated. The original judgment entered by the District Court awarded Petitioner the interpleader fund *solely* on the basis of his constructive trust claim. That judgment specifically rejected such other claims as were advanced by the parties, including Petitioner's resulting trust claim, with the clear and unambiguous statement that "all other relief not expressly granted herein is denied." That judgment and the provision here quoted was prepared by Petitioner's own attorneys.

Applying Texas law *pursuant to the Erie Doctrine,* it has been well settled since at least 1896 that where

> . . . the pleadings upon which the trial was had put in issue Plaintiff's right to recover upon two causes of action, and

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[7] *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175 (1938).

[8] *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508 (1924).

> the judgment awards him a recovery upon one, but is silent as to the other, *such judgment is prima facie an adjudication that he was not entitled to recover upon such other cause.* (emphasis added)[9]

This holding has been often cited and always followed. For example, in *Garrett v. A. G. McAdams Lumber Co.*, 163 S.W. 320 (Tex. Civ. App. — Amarillo 1914), reh. den., the court reviewed a judgment awarding a plaintiff recovery on one of two alternative theories advanced at the trial. The trial court entered judgment favorable to Plaintiff on one of the theories only. The appeals court held that an adjudication of liability of the defendant on one theory was "prima facie an adjudication that the [plaintiff] was not entitled to recover upon the [other theory] . . . ." *Id.* at 323. This holding was followed as recently as 1981 in *Schlipf v. Exxon Corp.*, 626 S.W.2d 74, 77 (Tex. Civ. App. — Houston 1981).

In the case at bar, the resulting trust claim was rejected not only by implication, but by the *express* language of the Judgment. Petitioner did not appeal that provision either directly or by way of cross-appeal. The reason for the rule is apparent and this case demonstrates its wisdom. Were it otherwise, a party such as Petitioner could advance numerous offensive or defensive theories by way of pleadings and litigate one at a time, seriatim. As in this case, such actions lead to endless litigation and appellate review which clearly is an unjust administration of the law.

Under the *Erie* Doctrine, Texas cases on *res judicata* and collateral estoppel should apply, however, it makes little difference whether one looks to the federal rules applicable to *res judicata* or the Texas cases previously cited because as the Fifth Circuit has previously noted ". . . in both federal courts and

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[9] *Rackley v. Fowlkes*, 89 Tex. 613, 36 S.W. 77, 78 (Tex. 1896), accord; *Schlipf v. Exxon Corp.*, 626 S.W.2d 74, 77 (Tex. Civ. App. — Houston, 1981); *Garrett v. A. G. McAdams Lumber Co.*, 163 S.W. 320 (Tex. Civ. App. — Amarillo 1914) reh. den.

Texas state courts, a judgment is final not only as to all matters which were decided, but also as to all matters which might have been tried."[10]

Furthermore, on no less than four occassions in the appellate process, Ward has raised this issue. His point has been considered and rejected by the Fifth Circuit and this Court. Petitioner's assertion that the issue was not adjudicated until the case was remanded to the District Court after *Sentry II* simply reflects his unwillingness to read the clear language of the Fifth Circuit's original opinion where the Court considered the issue and conclusively disposed of it by stating that "[t]he resulting trust analysis does not apply to this case . . . ."[11] Furthermore, the Fifth Circuit in *Sentry III* addressed this very issue and, stating that the court's opinion in *Sentry I* must be read as a whole, held that ". . . this Court had previously considered the alternative theory of resulting trust and rejected it . . . ."[12] The Court further stated "That the theory of resulting trust was considered on the prior appeal is further enforced by the strong dissent that was put forth by the Hon. Hubert L. Will, sitting on this Court by designation."[13] "Such statements constitute the 'professed deliberate determinations of the [court]' and, when done in this fashion, may not be summarily dismissed as dictum."[14]

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[10] *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334 (5th Cir. 1982); *Hall v. Tower Land and Investment Company*, 512 F.2d 481 (5th Cir. 1975), accord, *Aerojet-General Corporation v. Askew*, 511 F.2d 710 (5th Cir. 1975).

[11] *Sentry I, supra.* at 946.

[12] *Harris v. Sentry Title Co., Inc. (Sentry III)*, 806 F.2d 1278, 1280 (5th Cir. 1987).

[13] *Sentry III, supra.* at 1280.

[14] *Sentry III, supra.*, footnote at 1280.

III. The Fifth Circuit, In Applying The Law-Of-The-Case Doctrine, Was Correct In Refusing To Disregard The Precedent Set By The Panel In *Sentry I.*

Petitioner next argues that the Fifth Circuit panel erred in holding that it could not rule differently on the state law claim even if it perceived the resulting trust ruling by the prior panel to be contrary to controlling state law. Petitioner's characterization of the Fifth Circuit's opinion is inaccurate.

A federal court enunciating a rule of law to be applied in a particular case establishes the "law of the case," which "other courts owing obedience to it *must,* and which itself will, normally apply to the same issues in subsequent proceedings in that case." *Wm. G. Roe and Co. v. Armour and Co.,* 414 F.2d 862, 867 (5th Cir. 1969), citing *United States v. 162.20 Acres of Land,* 733 F.2d 377, 379 (5th Cir. 1984), cert. denied, 469 U.S. 1158 (1985).

> The court in *Roe* further stated that the law of the case
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> *must* be *followed* in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court, *unless* the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or *the decision was clearly erroneous and would work a manifest injustice.* (Court's emphasis)

The language cited above in the *Roe* case is crucial in that the Fifth Circuit in *Sentry III* relied on the opinion of *Roe* in deciding to apply the law-of-the-case doctrine. The court refused to disregard the precedent set by the prior panel and stated "[i]n the instant case, we see no grounds *or 'manifest injustice'* requiring a reexamination of the Court's prior opinion."[15] Thus, under *Roe,* the Fifth Circuit was correct in following the law of the case.

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[15] *Sentry III, supra.* at 1282.

Such a manifest injustice *would occur,* however, if the resulting trust issue were allowed to be relitigated again. As this Court and the Fifth Circuit have already held: "The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter." *United States of America and Interstate Commerce Commission v. United States Smelting, Refining & Mining Co.,* 339 U.S. 186 (1950); *Wm. G. Roe & Co. v. Armour & Co.,* 414 F.2d 862, 867 (5th Cir. 1969); *Poster Exchange, Inc. v. National Screen Service Corp.,* 362 F.2d 571, 574 (5th Cir. 1966); *Fontainebleau Hotel Corp. v. Crossman,* 286 F.2d 926, 928 (5th Cir. 1961).

IV. The Decisions Of The Fifth Circuit In This Case Correctly Interpret The Substantive Texas Law Regarding Resulting Trusts.

Finally, after stripping Petitioner's Petition of all its excess verbiage, Petitioner once again requests that this Court grant certiorari to review the full evidentiary record and inferences that be drawn and substitute its judgment of the facts for that reflected in the two appellate court decisions. Petitioner is asking this Court to disregard the Fifth Circuit's opinion and to determine if the facts of this case support a resulting trust.

It has historically been held that a resulting or purchase money trust must be created at the time of the transaction in which title to the property was taken in the name of the person charged with being trustee. Actions taken or promises made prior to the transaction or after the transaction are simply not relevant or even admissible to determine whether a resulting trust should be imposed. As stated by the court in *Trinity Fire Ins. Co. v. Solether:*

> To support a claim of resulting trust such as that asserted here, it must appear that the consideration was paid (or assumed) by the claimant and the trust created, at the very time and by reason of the very facts of the transaction itself. . . . In *Parker v. Coop, supra,* this rule, as stated in

> Perry on Trusts, is approved: The trust must result, if at all, at the instant the deed is taken, and the legal title vests in the grantee. No oral agreements, and no payments, before or after the title is taken, will create a resulting trust, unless the transaction is such at the moment the title passes that a trust will result from the transaction itself.[16]

As stated by the court in *Sentry I:*

> A resulting trust is an actual, binding trust that can develop where the parties intended a confidential or fiduciary relationship to develop and acted accordingly, but failed to create a valid actual trust agreement. * * * The resulting trust analysis does not apply to this case, however, because it requires evidence of a shared intent to establish a strict fiduciary relationship. 715 F.2d at 946.

As the Fifth Circuit has held in *two* prior opinions, there remains an insufficient basis for the imposition of a resulting trust.

The Fifth Circuit's holding is further supported by the Texas Supreme Court which has stated:

> The doctrine of resulting trusts is founded in the presumed *intention of the parties;* and, as a general rule, it arises where, and only where, such may be reasonably presumed to be the intention of the parties, as determined from the facts and circumstances existing at the time of the transaction out of which it is sought to be established.[17]

Furthermore, the Texas courts have consistently distinguished, as did the Fifth Circuit in *Sentry I,* between a constructive trust and resulting trust by the fact that a resulting trust carries with it the element of the intention to create a trust, while a constructive trust arises by operation of law without reference to

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[16] *Trinity Fire Ins. Co. v. Solether,* 49 S.W.2d 940, 942 (Tex. Civ. App. — San Antonio, 1932).

[17] *San Antonio Loan & Trust Co. v. Hamilton,* 155 Tex. 52, 283 S.W.2d 19, 28 (Tex. 1955).

intent.[18] The Fifth Circuit simply found that the facts of this case do not support a finding of such an intent.

The cases cited by Petitioner support Respondent's position that no resulting trust existed in this case. As stated in Petitioner's brief, "a resulting trust arises by operation of law when title to real property is conveyed to one person but the purchase price is paid by another,"[19] or when the beneficiary obligated himself to do so under an agreement made prior to or at the time of the conveyance.[20] As also stated by Petitioner, a resulting trust is predicated upon the equitable doctrine of consideration.[21]

The property in question here was purchased in the name of Respondent's predecessor in title, Home Engineering, Inc. $25,500 of the $30,500 purchase price was the *exclusive* obligation of Home Engineering, Inc. pursuant to its Promissory Note to Dyckman. The only payments made to Dyckman on the note were made by *Home* — not Ward. Ward was not *legally* obligated in any way either to Stuart Dyckman or to Home Engineering, Inc. for that sum of money. Indeed, any action by either Dyckman or Home Engineering, Inc. to attempt to compel *Ward* to pay that Note would clearly be subject to failure upon the mere raising of the Statute of Frauds defense, Section 26.01, Texas Business and Commerce Code; and Article 1288 V.R.C.S. To hold otherwise would require a

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[18] *San Antonio Loan & Trust Co. v. Hamilton,* 155 Tex. 52, 283 S.W.2d 19, 28 (Tex. 1955); *Sohio Petroleum Co. v. Junek,* 248 S.W.2d 294, 297 (Tex. Civ. App. — Ft. Worth, 1952, no writ); *Sentry I, supra.* at 946.

[19] Petitioner's Petition for Writ of Certiorari, p. 11.

[20] *Wright v. Wright,* 132 S.W.2d 847 (Tex. 1939); *Bybee v. Bybee,* 644 S.W.2d 218 (Tex. Civ. App. — Ft. Worth 1982); *Knox v. Long,* 251 S.W.2d 911, 917 (Tex. Civ. App. — Texarkana 1952), rev'd on other grounds, 152 Tex. 291, 257 S.W.2d 289 (1953); *Lail v. Hankla,* 276 S.W.2d 340, 346 (Tex. Civ. App. — Eastland 1955); *Stone v. Fitts,* 160 S.W.2d 1013, 1014 (Tex. Civ. App. — Ft. Worth 1942).

[21] *Id.*

judicial determination that the Statute of Frauds in Texas simply does not exist.

In order to establish a purchase money trust, it was necessary that Ward establish three things:

> (1) an agreement between the parties that such a trust shall exist, (2) that the beneficiary (Ward) furnished the money with which the purchase is to be made, or obligated himself to pay *it in a way that the purchaser can enforce it,* and (3) the conveyance was made to the grantee in pursuance of such agreements and obligation. *Stone v. Fitts,* 160 S.W.2d 1013, 1014 (Tex. Civ. App. — Fort Worth 1942) (emphasis added).

Ward has not met that burden. As previously noted, the Texas Statute of Frauds clearly would prevent Dyckman, Whatley or Home Engineering, Inc. from enforcing any "obligation" by Ward to repay the $25,500.00 part of the purchase price. As is said in *Hammett v. McIntire,* 365 S.W.2d 844, 847 (Tex. Civ. App. — Houston 1962):

> If prior to or contemporaneously with the execution of a deed conveying property to one person, another person pays the purchase price or becomes *legally* obligated to do so, and it is agreed that the person to whom the property is conveyed shall hold the title for the use and benefit of the person paying or becoming legally obligated to pay the purchase price, the bare legal title is in the grantee in the deed and equitable title is in the person paying or agreeing to pay the purchase price. (emphasis added)

As noted by the Fifth Circuit in this case, there is no evidence to support a finding of a strict fiduciary relationship between the parties whereby title to the Dyckman tract was to be held by Whatley in trust for Ward. It is significant that the *Stone* court refused to impose a trust in that case on facts strikingly similar to those of the instant case. The court noted that there was no pleading that the appellant had made "an absolute promise to reimburse appellee for the funds so expended." Similarly, there is neither a pleading *nor* proof that

Ward ever entered into a *binding* obligation to repay Appellants for the note Home Engineering executed to Dyckman.

As noted in *Rankin v. Naftalis,* 557 S.W.2d 940, 943-4 (Tex. 1977), one of the most recent Texas Supreme Court cases dealing with implied trusts:

> The Texas Legislature on successive occasions from the early days of the Republic has expressed its intent that contracts concerning lands must not, as Lord Coke expressed it, 'be left to slippery memory' but must be reduced to writing. The purposes served by and the reasons for the Statute of Frauds, Tex. Rev. Civ. Stat. Ann. Art. 7425b-7, are reiterated in *Consolidated Gas & Equipment Co. v. Thompson,* 405 S.W.2d 333 (Tex. 1966), and earlier by *Pope v. Garrett,* 211 S.W.2d 559, 562 (1948). In 1943, the law allowed some margin in the enforcement of express oral trusts; but in 1943 the Texas Trust Act terminated that liberality by the enactment of Article 7425b-7.

V. The Decision Of The Fifth Circuit In No Way Violates The Due Process Clause Of The Fifth And Fourteenth Amendments, The Petitioner's Right To Equal Protection, Or The Rules Of Decision Act.

Petitioner contends that the Fifth Circuit has violated the Due Process Clause of the Fifth and Fourteenth Amendments; the Petitioner's Right to Equal Protection; and the Rules of Decision Act. As Petitioner notes, due process encompasses the right to be heard — i.e., the right to have your theory considered and decided by the Court. If nothing else, he certainly has been heard.

The Fifth Circuit, after defining and distinguishing a resulting trust from a constructive trust in *Sentry I* at p. 946 stated "The resulting trust analysis does not apply to this case . . . ." In *Sentry III,* the Fifth Circuit, *once again,* addressed this very issue and stated:

> While this Court's statement, taken in an isolated fashion, arguably could be construed as dictum, . . . , the Court's

opinion must be read as a whole. This Court *obviously* was well aware that the theory of resulting trust was an alternative theory on which Ward might possibly have recovered in the district court. In any event, *since this Court had previously considered the alternative theory of resulting trust and rejected it, the Court specifically directed that judgment be entered in favor of Sentry Title* .... *Sentry III* at 1280.

The Fifth Circuit further stated in its footnote:

It is common practice for this Court to consider theories other than that relied upon by the district court in order to consider whether the judgment of the district court may be affirmed on an alternative ground. Often the Court will ask the parties to submit supplemental briefs to assist the Court in this effort. *Here, the Court on the prior appeal addressed an issue which required no further fact finding by the district court and which had been briefed by the parties in trial briefs included in the record. Such action promotes the finality of litigation, consistent with the goal that "the federal system aims at a single judgment and a single appeal."* 1B Moore's Federal Practice paragraph 0.404[10], at 169 (1984). Similarly, this Court often addresses issues for the guidance of the parties and the district court on remand. It cannot be said that such considered statements should be dismissed as dictum simply because the Court was not absolutely required to raise and address such an issue. *Such statements constitute the "professed deliberate determinations of the [court]" and, when done in this fashion, may not be summarily dismissed as dictum. See,* Black's Law Dictionary 409 (5th ed. 1979). *Sentry III* at 1280. (emphasis added)

This language clearly established the full adjudication of the resulting trust issue. The concept of due process — while insuring the right to be heard — does not insure the litigant he will be pleased with the decision. And, of course, Ward is *not* pleased with the result. But in most cases, half of all litigants *will not* be satisfied with the result. Someone has to lose. The mere fact that one has lost a case does not mean he has been

denied due process or that there is a lack of fundamental fairness.

The court in *Sentry III found* "no grounds or manifest injustice" requiring a reexamination of the court's prior opinion. *Sentry III,* at 1282. This finding is consonant with the *Sentry I* panel's holding that their award in favor of Whatley *would not result in unjust enrichment to Whatley. Sentry I,* at 949. Petitioner's due process and equal protection rights and the Rules of Decision Act were simply not violated.

VI. Petitioner, Having Exhausted All Reasonable Remedies, Is Now Pursuing Frivolous Remedies In An Attempt To Thwart The Results Of His Unsuccessful Appeals.

If there is any serious due process and equal protection issues in this case, it is the Respondents' right to have this litigation brought to an end. While recognizing that all litigants are entitled to due process, Respondent would respectfully submit that no litigant is entitled to abuse that process to the detriment of his adversaries or the courts. A brief history of the instant litigation would show that Petitioner Travis Ward has engaged in such abuse.

This case was filed in 1975 — 12 long years ago — and relates to transactions which occurred in 1970. After languishing in federal district court, for a variety of reasons, from 1975 until late 1980, the district court finally entered an order in early 1981 that the case be brought to trial in April 1981.

Trial consumed approximately one week. In November 1981, the district court entered its findings of fact and conclusions of law. That resulted in a judgment being entered in January 1982. That judgment sustained Petitioner's claim only on a constructive trust theory and denied all other relief. Respondents appealed the decision. Almost four years ago, in September 1983, the Fifth Circuit reversed the district court's decision, and rendered judgment in favor of Respondents.

Since the inception of this case, Ward has been represented by no less than six different attorneys and firms. Ward was initially represented in the state and federal court litigation by the firm of Strasburger & Price of Dallas, Texas, one of the largest firms in the city. Rohde, Chapman, Ford & Howe tried the case and handled the initial appeal to the Fifth Circuit. Rohde, Chapman was followed by Professor William Dorsaneo. When that proved to be unsuccessful, Professor Dorsaneo was followed by Professor Page Keaton, former Dean at the University of Texas School of Law, of the firm of Scott, Douglas & Keaton, who handled Petitioner's motion for recall of mandate. When that did not result in a favorable decision, Petitioner then hired the firm of Hiram C. Eastland, Jr. of Jackson, Mississippi, who filed Ward's second motion for *en banc* rehearing. When that did not succeed Ward then hired James C. Coleman, retired Chief Judge of the United States Fifth Circuit, to assist in obtaining another rehearing of the matter and who is also listed as counsel in this proceeding.

At the time Ward withdrew the funds on deposit with the Clerk of the Court, in February 1982, he received the sum of approximately $400,000. While it is impossible to estimate the total sum which Mr. Ward has spent on attorneys' fees in the course of this case, one may safely presume that they have probably consumed the substantial portion of the funds which Mr. Ward has received. Mr. Ward's actions have now gone beyond a mere attempt to obtain due process and constitute an abuse of process.

It is interesting to note that though Ward has filed *four* suggestions for *en banc* rehearings, every one has been denied without a single member of the Fifth Circuit even requesting a poll of the court.

Not counting his supplemental briefs, Petitioner has filed no less than *ten* briefs in the Fifth Circuit in this case — three principal briefs prior to each published decision, three Motions for Rehearings and four Motions for Rehearings En Banc. Mr.

Ward's right to due process should not be allowed to infringe upon Respondents' correlative and equally important right to due process, which includes the right that all litigation should ultimately be brought to an end. Twelve years is long enough. This is not a complicated action. It involves relatively straight forward legal issues and there are dozens of cases in which the course has been charted over the years. The Fifth Circuit had ample opportunity to consider and has properly decided the issues presented. However, even if by some chance the Fifth Circuit were wrong, that is not a basis for this litigation to be allowed to continue indefinitely. All cases must ultimately come to a conclusion and it is well past time that this one be brought to that conclusion.

The petitioner does not raise any issues which were not previously raised in this Court. There are no new cases to be considered. Petitioner's actions are designed simply to gain time. They are kinds of actions which this Court has explicitly stated it will not tolerate. Sup. Ct. Rule 492 provides that this Court may award Respondents damages when it appears that the petition is "frivolous." That rule is predicated on the power granted in 28 U.S.C. 1912. In referring to the predecessor of this section, the Court has said:

> This gives us the only power we have to prevent frivolous appeals, and writs of error; and we deem it not improper to say that this power will be exercised without hestitation in all cases where we find out our jurisdiction has been invoked merely to gain time. *Amory v. Amory,* 1 Otto 356, 357 (1875), 91 U.S. 356, 23 L.Ed. 436.

The actions of Petitioner's many attorneys reflect an intention to delay this case and turn it into one which never ends. It would be indeed difficult to find a case in which it would be more appropriate to apply the Second Circuit's admonition that "We will not countenance attempts to pervert the federal judicial process in a Dickensian Court where lawsuits never end." *Overmyer v. Fidelity and Deposit Co. of*

Maryland, 554 F.2d 539, 543 (1977). Respondents believe that this case presents one of those rare instances in which an award of damages would be appropriate.

VII. Conclusion

For the foregoing reasons, Respondents respectfully request that this Court deny the Petition and award Respondents damages due to Petitioner's vexatious and dilatory tactics.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of June, 1987, I served copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari on the party hereto by mailing three copies of said document by United States mail, in duly addressed envelopes, with postage prepaid, to Hiram C. Eastland, Jr., Esq., Eastland Law Offices, 600 E. Amite Street, Jackson, Mississippi 39202, Counsel of Record.

I further certify that all parties required to be served have been served.

_____

J. Albert Kroemer